COURT OF APPEALS
DECISION
DATED AND RELEASED

April 17, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-2721

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DIANE M. SOMERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

EICH, C.J.[1] Diane M. Somers appeals from a decision and order determining that her refusal to submit to a blood test for alcohol content after being arrested for operating a motor vehicle while intoxicated was unlawful. She argues that: (1) the refusal proceedings were instituted by the wrong governmental entity; (2) the trial court lost personal jurisdiction in the matter when the notice of

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

intent to revoke her license was not admitted into evidence; (3) the testimony of the arresting officer was "fabricated" or "delusion[al]" and should not have been relied on by the trial court; and (4) her refusal to submit to the blood test was justified by fear for her own safety. We reject the arguments and affirm the order.

I. Authority to Proceed

The Notice of Intent to Revoke Operating Privilege—which, as we explain below, is the equivalent of a charging document—stated at the top that the name of the "Enforcement Agency" was "Jefferson Sheriff," and when the trial court called the case for hearing, it stated "Jefferson County v. Somers." Somers's attorney immediately objected, claiming that refusal hearings could only be prosecuted by the State of Wisconsin and moving for dismissal. The district attorney explained that the underlying charge of operating while intoxicated was a county charge, and stated that she was appearing at the refusal hearing on behalf of the State. The trial court denied the motion, rejecting Somers's arguments that: (1) the court lacked authority to proceed on the basis of the manner in which it called the case; and (2) the fact that the clerk of court had sent out notices of the hearing captioned "Jefferson County v. Somers" rendered county jurisdiction immutable.

Somers claims that the supreme court addressed this "precise issue" in ***Madison v. Bardwell,*** 83 Wis.2d 891, 266 N.W.2d 618 (1978). Our reading of ***Bardwell*** does not bear out that assertion. It is true that the defendant in ***Bardwell*** argued that his refusal to take a breath test should be upheld because the Madison city attorney, not the Dane County district attorney, appeared at the proceeding. ***Id***. at 901, 266 N.W.2d at 623. The supreme court agreed that "the district attorney and not the city attorney is the proper party to prosecute [a refusal]

proceeding," pointing to § 343.02, STATS., 1977, which indicated that refusal proceedings are to be prosecuted by the state. ***Id***. at 903, 266 N.W.2d at 624.

In this case, the district attorney *did* appear for the State, and Somers has offered no authority to support the defendant's generally stated argument that the fact that the clerk's notice listed the county as the petitioning party somehow deprived the trial court of jurisdiction to proceed with the hearing.[2] Nor does she suggest how the error in the caption of the notice may have prejudiced—or in any way affected—her case.[3] Her argument is limited to stating that, by proceeding, the court "blindly elevate[d] form over substance." She continues:

> How can we expect to preserve respect for our system if our courts, with a wink and a nod, essentially tell defendants it is largely irrelevant which governing body is prosecuting them. What is truly offensive (not to mention bad public policy) about this case is not so much how the casual disregard for form affected Ms. Somers'[s] rights, but instead, how it will affect the collective perception of our legal system.

We do not share Somers's fears. We see no error, jurisdictional or otherwise, in the trial court's decision to proceed with the hearing.

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[2] Indeed, the clerk's notice of the hearing does not appear in the record. It is, of course, the appellant's responsibility to ensure that evidence and other materials pertinent to the appeal are in the record, and failure to incorporate such materials into the record may constitute grounds for dismissal of the appeal. ***State v. Smith***, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972). In any event, our review is limited to those portions of the record available to us. ***Ryde v. Dane County***, 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977).

[3] We have often said that we do not consider arguments that are unexplained or undeveloped, or unsupported by citations to authority or references to the record. ***M.C.I., Inc. v. Elbin***, 146 Wis.2d 239, 244-45, 430 N.W.2d 366, 369 (Ct. App. 1988); ***Lechner v. Scharrer***, 145 Wis.2d 667, 676, 429 N.W.2d 491, 495 (Ct. App. 1988).

II. The Notice of Intent to Revoke

Pointing to § 343.305(9)(b), STATS., which states that "use of the [Notice of Intent to Revoke] by a law enforcement officer in connection with the enforcement of this section is adequate process to give the appropriate court jurisdiction over the person," Somers argues that because the Notice was not admitted into evidence at her hearing, the trial court lacked jurisdiction over her person. She also says that because the Notice is the functional equivalent of a summons and complaint in a civil proceeding, ***State v. Schoepp***, 204 Wis.2d 266, 272, 554 N.W.2d 236, 238 (Ct. App. 1996), and it was never filed, the court lacked authority to proceed.

Taking the latter point first, Somers does not contend that the Notice was never "filed" with the court,[4] only that it was not admitted into evidence at the hearing. Beyond that, Somers never raised the point until the court was delivering its decision from the bench after the testimony and arguments of counsel had concluded. When the court, noting that the Notice had not been admitted into evidence, remarked that Somers had not raised that fact as a defect in the case, Somers's attorney interrupted to move to dismiss on the ground that its absence was indeed a defect. The court denied the motion as untimely. It appears plain to us that the decision not to entertain an objection that was never made before the matter was submitted to the court for decision—and then making it only when the

[4] As we noted above, the Notice was before the court, for it read from the document during Somers's argument that the county was the improper prosecuting entity.

court, in rendering its decision, pointed out that no such objection had been made—was an appropriate exercise of the court's discretion.[5]

Beyond that, as before, Somers does not indicate how the failure to formally admit the Notice into evidence affected the presentation of her case at the refusal hearing. We recognized in ***Canadian Pacific Ltd. v. Omark-Prentice Hydraulics,*** 86 Wis.2d 369, 372, 272 N.W.2d 407, 408 (Ct. App. 1978), that when the defendant has not been misled or otherwise prejudiced by "technical nonconformity" with procedural statutes, there are no grounds for dismissal.[6] We reach the same conclusion here.

III. The Arresting Officer's Testimony

Somers next argues that the trial court erred when it credited the testimony of the arresting officer, Jefferson County Deputy Sheriff David Drayna, over her own. She argues that the trial court should not have believed Drayna "because on all material issues, his testimony was directly refuted by the testimony of the other witnesses." Specifically, she points to a statement Drayna made during his testimony that Somers had been traveling "westbound" on the highway, rather than eastbound, as she apparently was. Again, without citing or

[5] We have long recognized that a trial court's discretionary decisions are not tested by some subjective standard, or even by our own sense of what might be a "right" or "wrong" decision in the case, but rather will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion. ***State v. Jeske***, 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Ct. App. 1995).

[6] Somers states that because the Notice was not admitted into evidence, "the trial court had no more authority to enter an order than would a large claims court have to enter judgment in a civil action where a summons and complaint had never been filed." That may be true; but we recognized in ***Canadian Pacific Ltd.*** that, without a showing that the error affected the defendant's substantial rights, even the omission in the summons of any indication of the time in which an answer was required did not constitute grounds for dismissal. ***Id.*** at 372-73, 272 N.W.2d at 409.

pointing us to any authority on the subject, Somers's is little more than a personal attack against Drayna, suggesting that he "fabricated events [in order] to legitimize his …. arrest of … Somers," and that his testimony "was obviously the product of either collusion or delusion." Such unsupported *ad hominem* arguments deserve only the briefest of responses: It is for the trial court, not this court, to determine the credibility of the witnesses and the weight to be given their testimony. ***Leciejewski v. Sedlak***, 116 Wis.2d 629, 637, 342 N.W.2d 734, 738 (1984).[7]

IV. Fear of Harm as Justifying the Refusal

Finally, Somers argues that her refusal to assent to a test of her breath or blood should be excused under the rule of "legal justification," citing ***State v. Brown,*** 107 Wis.2d 44, 318 N.W.2d 370 (1982), where the supreme court extended certain criminal defenses to traffic-law violations and held, among other things, that when an arresting officer's conduct in chasing a speeder is so egregious as to cause the defendant to "reasonably believe that violating the law [e.g., speeding away from the officer] is the only means of preventing bodily harm," and "causes the [defendant] to violate the law," then the defense is available to the defendant in a civil traffic case. ***Id***. at 55-56, 318 N.W.2d at 376.

Drayna testified that, while administering field sobriety tests to Somers, he asked her, as part of the testing process, to take a preliminary breath

[7] The trial court's determination in this regard will not be disturbed where more than one reasonable inference can be drawn from the credible evidence. ***Johnson v. Merta*** , 95 Wis.2d 141, 151, 289 N.W.2d 813, 818 (1980). Such deference to the trial court's determination of the credibility of witnesses is justified because of its superior opportunity to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony. ***Id***. at 151-52, 289 N.W.2d at 818. "Thus, the trial judge, when acting as the factfinder, is considered the 'ultimate arbiter of the credibility of a witness,' and his [or her] finding in that respect will not be questioned unless based upon caprice, an abuse of discretion, or an error of law." **Id**. at 152, 289 N.W.2d at 88 (quoted source omitted).

test. She initially refused, telling Drayna that her attorney had advised her never to take a breath test. She eventually submitted to the test and it was administered on the scene. A short time later, after he read the "informing the accused" material to her, Drayna asked Somers: "Will you submit to an evidentiary chemical test of your blood?" and she answered "No," offering no further explanation or protest. At trial, the court heard Somers's testimony with respect to the "defense." She stated:

> The squad car was not clean. It stunk. I don't know if it was urine or what it was, but it stunk and the squad was filthy. When [Drayna] asked for blood I said no because I could not imagine. I mean, I was scared, outraged, what is this guy going to do? He's going to pull out a needle and draw my blood right here, right now? And that's what I thought, because when I did finally submit to the roadside breath test that's what it was—they did it right there right then. So when he asked could he have my blood, I said: No, you can't have my blood. He didn't put it that way. He asked if I would take the test; and I said no.

The trial court declined to credit this testimony, stating:

> The court finds that Ms. Somers is not credible when she testified she thought her blood was going to be withdrawn then and there in the squad car. She never asked Officer Drayna if that is what he intended to do. She simply refused when requested to submit to a test of her blood. She earlier had refused to submit to a Preliminary Breath Test, stating that she had been advised by an attorney to take no tests. It is more plausible to the court that she refused to submit to a test of her blood when requested … under the same belief that it was a tactical or strategic thing to do because an attorney told her to submit to no test.
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> So, first of all, the court does not believe Mrs. Somers is telling the truth when she says she was afraid to say yes to the request … because it was going to be conducted in the back of the squad car ….
>
> Second[], if she did believe that, it is not a reasonable thing to believe and cannot amount to legal

> justification, if the belief for the justification is unreasonable….

We have discussed the rules applicable to our review of a trial court's credibility determinations. Somers first claims that the trial court's "belief that [she] had been given the blanket advice to avoid all tests," was unreasonable, and a "mistaken view of the evidence," in light of her testimony that she had been advised not to take a "breath test." She says the court made an unreasonable inference from the evidence. We disagree. We think it may reasonably be inferred from the undisputed testimony that her refusal to take the blood test, like her earlier refusal to take a breath test, was due to her attorney's advice—even if that advice was stated in terms of just a "breath test."

We acknowledge the points Somers makes—that she was "unfamiliar with OWI arrest protocol," that when she eventually consented to the preliminary breath tests moments earlier, it was administered on the scene, and that she was handcuffed and in the squad car when asked whether she would consent to a blood test. But we cannot say that the trial court erred in drawing the inferences it did from the evidence. The rule is that if there is any credible evidence in the record which, under any reasonable view, fairly admits of an inference that supports the trial court's finding, that finding may not be overturned. ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995). If any possibility exists that the trial court could have drawn the appropriate inferences from the evidence adduced at trial in order to reach the decision it did, we may not overturn that decision even if we disagree with it, or would not have drawn that inference ourselves. ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). This case meets those rules.

By the Court.–Order affirmed.

This opinion will not be published. RULE 809.25(1)(b)4, STATS.